

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 05-0452  
Sales and Withholding Tax  
Responsible Officer  
For the Tax Period 1990-1993**

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**ISSUES**

**1. Sales and Withholding Tax-Responsible Officer Liability**

**Authority:** IC § 6-2.5-9-3; IC § 6-8.1-5-1(b); IC § 6-3-4-8(f); IC § 6-8.1-5-4; Indiana Department of Revenue v.Safayan, 654 N.E.2<sup>nd</sup> 279 (Ind.1995).

The taxpayer protests the assessment of responsible officer liability for unpaid corporate sales and withholding taxes.

**II. Tax Administration- Ten Percent Negligence Penalty**

**Authority:** IC § 6-8.1-10-2.1; 45 IAC 15-11-2(b); 45 IAC 15-11-2(c).

The taxpayer protests the imposition of the ten percent negligence penalty

**STATEMENT OF FACTS**

The taxpayer was the secretary/treasurer of a corporation that sold and serviced computers. The corporation did not remit sales taxes and withholding taxes to the state during the tax period 1990-1993. The Indiana Department of Revenue (department) assessed the unpaid sales taxes, withholding taxes, interest, and penalty against the taxpayer as a responsible officer of that corporation. The taxpayer protested the tax assessment. A hearing was held and this Letter of Findings results.

**1. Sales Tax and Withholding Tax-Responsible Officer Liability**

### Discussion

Notices of proposed assessments are prima facie evidence that the department's claim for unpaid taxes is valid. IC § 6-8.1-5-1(b). The taxpayer has the burden of proving that the department incorrectly imposed the assessment. Id. Taxpayers are required to keep adequate books and records so that the department can determine the proper tax owed to the state. IC § 6-8.1-5-4.

The proposed sales tax liability was issued under authority of IC § 6-2.5-9-3 that provides as follows:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes, to the state.

The proposed withholding taxes were assessed against the taxpayer under authority of IC § 6-3-4-8(f), which provides that "In the case of a corporate or partnership employer, every officer, employee, or member of such employer, who, as such officer, employee, or member is under a duty to deduct and remit such taxes shall be personally liable for such taxes, penalties, and interest."

Pursuant to Indiana Department of Revenue v. Safayan, 654 N.E.2<sup>nd</sup> 279 (Ind.1995) any officer, employee, or other person who has the authority to see that sales and withholding taxes are paid has the statutory duty to remit those trust taxes to the state. The taxpayer submitted substantial documentation indicating that during most of the tax period he was primarily involved in selling and servicing computers rather than handling the financial affairs of the corporation. During this period, the submitted documentation indicated that the business manager and president managed the daily financial affairs of the corporation and determined which creditors would be paid. The taxpayer was, however, the secretary/treasurer. Whether or not he availed himself of the opportunity to assert such authority, the taxpayer had the authority to be involved in the financial dealings of the corporation and determine which creditors would be paid. After the death of the president, the taxpayer became more involved in the daily finances of the corporation. At that time, he could have seen that the tax arrearage was satisfied. The taxpayer, business manager, and president were jointly and severally liable for the remittance of the sales and withholding trust taxes to the state.

Alternatively, the taxpayer argued that the corporate tax liability was calculated incorrectly resulting in an artificially high assessment. There were not adequate records for the department to determine the actual corporate tax liability at the time of the investigation. Therefore, the department estimated the corporate sales and withholding tax liability. The taxpayer provided substantial documentation indicating that the department's calculation was flawed. The taxpayer

sustained his burden of proving that the assessed corporate sales and withholding tax liability for 1990-1993 was too high.

### **Finding**

The taxpayer's protest is denied as to his responsibility to remit corporate trust taxes to the state. The taxpayer's protest as to the method of calculating the amount of tax due is sustained. The audit division is requested to review the proposed alternative calculation and make whatever adjustment it deems warranted.

## **II. Tax Administration- Ten Per Cent Negligence Penalty**

### **Discussion**

The taxpayer protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at 45 IAC 15-11-2(c) as follows:

The department shall waive the negligence penalty imposed under IC 6-8.1-10-1 if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with

according to the particular facts and circumstances of each case.

The taxpayer affirmatively established that its failure to pay the proper amount of sales and use tax was due to reasonable cause rather than negligence in this particular situation.

**Finding**

The taxpayer's protest to the imposition of penalty is sustained.

KMA/JMM/DK /06/26/04